BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA M. HUGGINS	)	
Claimant	)	
	)	
VS.	)	
	)	
HAYSVILLE HEALTH CARE CENTER	)	
Respondent	)	Docket No. **1,046,676**
	)	
AND	)	
	)	
PREMIER GROUP INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 9, 2011 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on November 18, 2011.

APPEARANCES

Michael L. Snider of Wichita, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained an 87 percent work disability based upon a 100 percent wage loss and a 74 percent task loss.

Respondent requests review of the following issues: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) the date of accident; (3) whether claimant gave notice and timely written claim; (4) average weekly wage; (5) nature and extent of claimant's disability; and, (6) whether claimant is entitled to medical, unauthorized and future medical.

Respondent argues that the ALJ erred in finding that claimant's vascular necrosis constitutes an injury arising out of and in the course of claimant's employment. Therefore, respondent contends the ALJ's Award should be reversed and compensation denied.

Claimant argues the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked as a certified nurses aide (CNA) for respondent for several years. Her job required that she assist patients to get in and out of bed, wheel chairs and bathrooms. At one point in 2007, respondent had two patients sleeping on mattresses on the floor due to concerns that they might fall. Claimant had to assist these patients as well. Claimant began noticing pain in her right hip in 2007. The pain increased with the lifting being done at work. Claimant advised her charge nurse, Jamie Brian, of the problem and was even given pain medication in the form of Tylenol for the pain.

As claimant continued working the pain in her hip did not improve. Claimant acknowledged that she had hip pain when putting on shoes and clothes, when climbing in and out of cars and when going to the bathroom. Claimant had pain with practically all physical activities involving her hip. Because of her ongoing problems, claimant began to limit her physical activities at home, doing only limited cleaning and other household chores.

On April 14, 2008, claimant was seen at the Hunter Health Clinic with a history of right hip pain for a period of 10 months. Claimant was diagnosed with arthritis in the hip, and pain medication was prescribed. X-rays were recommended, but claimant had no health insurance and was unable to pay for the x-rays. The Hunter Health Clinic records continue through March 2, 2009, at which time claimant continued to complain of right hip pain. The report of March 2 indicates a history of hip pain for 1½ years. There is no history of the cause of this hip pain in the Hunter Health Clinic records.

On August 15, 2008, claimant was seen by Dr. Del Rey for right hip pain and provided a history of gradual onset of pain for approximately a year. Claimant noted her pain was aggravated by any movement. But there was no mention in the doctor's record that work had caused her problem.

As claimant's pain progressed she began to use a crutch to get from her car into the respondent's facility to work and by December 2008 she was using two crutches to get from her car into work. But to perform her work claimant used a laundry container that had wheels on it to assist her with walking at work.

On February 19, 2009, claimant finished her shift at work but was having such severe hip pain that she could hardly walk. Consequently, claimant sought medical treatment on her own at the Wesley Medical Center emergency room (ER) on February 19, 2009. The history in the Wesley Medical Center ER records notes hip pain while walking. Additionally, claimant walked with a limp and used crutches because of the pain. The pain is noted to have worsened within the last week, although no reason was given for the increased pain. The ER records also note a history of hip pain for 1½ years. The Wesley Medical Center ER records indicate that claimant is a CNA, but contain no information leading to any work involvement with the hip problem. The Diagnostic Imaging Report from February 19, 2009, discusses a flattening of the femoral head with sclerosis representing avascular necrosis. The medical reports indicate claimant had no insurance and the ER personnel attempted to locate a medical facility to take claimant on a charity basis. Claimant's referral back to Hunter Health Clinic on March 2, 2009, was apparently the result of these activities by the ER personnel.

Claimant was taken off work for a week and was provided an off work slip. She took the off work slip to work and placed it under the director of nursing's door. Claimant then returned to work and continued performing her duties. On July 22, 2009, claimant filed an application for hearing alleging repetitive injuries to her hip, lower back and shoulder commencing January 2009 and each day worked thereafter.

At claimant's attorney's request, Dr. George Fluter, a board certified independent medical examiner, examined claimant on two occasions. On August 27, 2009, Dr. Fluter reviewed the medical records provided and also took a history from claimant who presented with complaints of pain affecting the right and left shoulders, right and left hands, right hip/groin/buttock and right knee. Upon physical examination on August 27, 2009, the doctor diagnosed claimant as having right hip/groin pain, possible avascular necrosis affecting the right femoral head, lower back pain, bilateral shoulder pain, bilateral hand numbness and also right knee pain. Dr. Fluter opined that there is a causal/contributory relationship between claimant's current condition and her work-related activities. The doctor further opined that claimant developed gait abnormalities due to the use of bilateral axillary crutches and she also used a rolling cart at work for an ambulatory aid.

The following restrictions were placed on claimant by Dr. Fluter: (1) no lifting, carrying, pushing and pulling to 10 pounds occasionally and negligible weight frequently; (2) avoid prolonged standing and walking; (3) avoid squatting, kneeling, crawling, climbing, bending, stooping or twisting to an occasional basis; (4) no activities at or above shoulder level using each arm to an occasional basis; (5) restrict repetitive grasping with each hand to an occasional basis; and, (6) restrict repetitive flexion and extension of each wrist to an occasional basis. Dr. Fluter recommended medications for pain, bilateral hand/wrist splints at night and during symptomatic periods during the day, x-rays of the shoulders and low back, an orthopedic evaluation and a CT scan of the right hip, electrodiagnostics studies of bilateral arms and cervical paraspinals, and possible steroid injections and or surgical consultations.

Dr. Fluter examined claimant again on January 6, 2011. Based on the AMA *Guides*, Dr. Fluter rated claimant's right hip at 50 percent or a 20 percent body as a whole for a fair hip replacement result, for the right knee a 20 percent or 8 percent whole body impairment due to range of motion deficits, for the left shoulder a 10 percent permanent partial impairment due to range of motion deficits, and for the low back, claimant receives a 5 percent in accordance with the DRE Lumbosacral Spine Impairment Category II due to myofascial pain. Using the Combined Value Charts, claimant receives a 34 percent whole body impairment due to her right hip, knee, left shoulder, and low back.

Dr. Fluter reviewed the list of claimant's former work tasks prepared by Mr. Doug Lindahl and concluded claimant could no longer perform 17 of the 23 tasks for a 74 percent task loss.

On December 1, 2009, Dr. Paul Stein, board certified in neurological surgery, performed an examination and evaluation of claimant at the request of the respondent's attorney. The doctor reviewed the medical records provided and also took a medical history from claimant. Claimant provided a history of a gradual onset right hip, groin and buttock pain. Claimant would occasionally complain of hip pain to the nurses but never requested medical treatment as she thought her symptoms would improve which they did not.

Based upon his examination, Dr. Stein diagnosed claimant with avascular necrosis which most commonly is caused by a femoral neck fracture which claimant did not have. Dr. Stein noted the other major factor in the development of avascular necrosis is smoking. The doctor opined that claimant's heavy smoking as well as being overweight caused the development of the avascular necrosis in her right hip. Dr. Stein opined "that once the avascular necrosis set in that her work activity may have increased the pain but it wasn't the cause of the disease."[1]

> Q. Were you also able to arrive at any conclusions regarding whether or not the work activity that she engaged in as a CNA aggravated or contributed to her avascular necrosis?
>
> A. I don't believe it did to any significant degree, no.
>
> Q. And your reason for saying that is what?
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> A. Well, because if you look at a million CNAs, they don't get avascular necrosis. If you look at heavy smokers or who are overweight, some of them do get avascular necrosis. This process in my opinion was not related to her work activity.[2]

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[1] Stein Depo. at 9.

[2] Stein Depo. at 10.

On cross examination, Dr. Stein testified that repetitive overuse activities can cause femoral neck fractures which lead to osteonecrosis. And he noted that the fact an individual has a total hip replacement, in and of itself, does not necessarily require imposition of permanent restrictions. Dr. Stein noted that he would defer to the orthopedic surgeon who performed the hip replacement regarding whether or not claimant needed restrictions.

On October 27, 2009, the ALJ ordered an independent medical examination by Dr. Terrance Pratt to determine whether or not claimant's right hip pain and bilateral upper extremity pain were caused by her work-related injury with respondent. The doctor reviewed the medical records provided and also took a history from claimant. The medical records indicated an onset of right hip pain sometime in 2007. Dr. Pratt agreed that there was no indication in any of the medical records that claimant complained that work caused her hip complaints.

Dr. Pratt performed a physical examination of claimant on January 5, 2010, and diagnosed her with right hip discomfort with degenerative disease and probable avascular necrosis; bilateral shoulder discomfort of undetermined etiology; bilateral hand numbness; mid low back discomfort; right knee discomfort with history of degenerative joint disease; obesity; and chronic nicotine use.

Dr. Pratt opined that claimant's work activities did not cause her hip condition but caused an aggravation of her underlying involvement which he explained meant an increase in her symptoms. Dr. Pratt explained:

> Q. And I'd like to stop you right there and ask you the -- the -- what you've just told us is that you believe she had aggravation of underlying involvement. That's the area that I'd like to talk to you in a little more detail. Could you describe when you say aggravation of her underlying involvement, are you referring to an increase in her symptoms?
>
> A. Yes.
>
> Q. Are you referring to anything else?
>
> A. An increase in her symptoms due to the activities. It is -- it was not stated with a degree of medical certainty whether that aggravation resulted in acceleration of the underlying involvement. We do not have films before that point that we could compare with the prior. All we have is her symptoms that she reports as being worse.
>
> Q. So, just so that I'm clear, is it your opinion that you cannot state within a reasonable degree of medical probability that she had any acceleration of her underlying condition, but only that she had an increase in her symptoms as a result of the vocational-related activities?

A. That's correct.[3]

Dr. Pratt further testified that it was probable that claimant's avascular necrosis would have progressed regardless of whether she was working as a CNA as long as she engaged in normal day to day activities and was ambulatory.

> Q. Is it probable that Ms. Huggins' avascular necrosis and the structural deterioration of her hip would have continued to progress regardless of whether she was working as a CNA or not as long as she engaged in normal day-to-day activities?
>
> A. If the normal activities included ambulation, yes.
>
> Q. Is it probable that Ms. Huggins' avascular necrosis and the structural deterioration of her hip would have progressed to the point where she required hip replacement surgery regardless of whether she was working as a CNA or not as long as she engaged in normal day-to-day activities, such as ambulation, bending to put on her shoes and socks, et cetera, et cetera?
>
> A. I would have to question what's meant by "et cetera, et cetera," but before that statement, I would say yes.[4]

On cross examination, Dr. Pratt testified that traumatic episodes can contribute to the development of avascular necrosis, also known as osteonecrosis. The doctor again agreed that claimant's work activity aggravated her underlying degenerative bone condition but on re-direct noted he would not change any of the opinions expressed upon direct examination. Dr. Pratt further noted that he would defer to the orthopedic surgeon who performed claimant's hip replacement regarding whether or not she needed restrictions.

Dr. John Schurman, a board certified orthopedic surgeon, was authorized to examine claimant on May 19, 2010, in order to diagnose her condition and provide treatment. The history claimant provided of an onset of right hip pain in 2009 was inconsistent with the medical records which revealed an onset of right hip pain in 2007. Upon physical examination, the doctor diagnosed claimant as having advanced degenerative arthritis and x-rays revealed end stage osteonecrosis or avascular necrosis of the right hip. Dr. Schurman performed claimant's right hip replacement on June 25, 2010. Follow-up appointments occurred on July 13, 2010, and August 18, 2010, and claimant was progressing at the normal course of recovery. Dr. Schurman released claimant to return to her normal job duties beginning October 1, 2010.

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[3] Pratt Depo., at 9,10.

[4] Pratt Depo. at 12.

Dr. Schurman noted that there were a variety of causes for avascular necrosis and from claimant's record she would fit into the idiopathic category. The doctor explained that meant he did not know what pathology caused claimant's avascular necrosis. Dr. Schurman further opined that smoking was not generally felt to be a risk factor in the development of avascular necrosis. And Dr. Schurman noted that for a fracture to cause avascular necrosis it would be a fracture that required treatment and is not something that occurs below the patient's level of awareness. Moreover, Dr. Schurman noted that a stress fracture of the femoral neck would result in a reparative scar visible on x-ray and claimant did not have that.

Doug Lindahl, a vocational rehabilitation counselor, conducted a personal interview with claimant on March 29, 2011, at the request of claimant's attorney. He prepared a task list of 23 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, claimant was not working for respondent.

When claimant filed her application for hearing on July 22, 2009, she alleged repetitive injuries to her hip, lower back and shoulder commencing January 2009 and each day worked thereafter. At the regular hearing when the ALJ was taking stipulations claimant alleged an accident date of each and every day worked up through February 19, 2009.

After the claimant finished her shift on February 19, 2009, she went to the emergency room because of the pain in her hip. She then called the director of nursing and told her that she was hurting so bad when she left work that she went to the hospital and was told to stay off work for a week. Claimant was told to bring the off work slip in to work. The ALJ concluded the conversation provided notice and February 19, 2009 was the date of accident.

Because claimant alleged a repetitive series of accidents the determination of the date of accident is controlled by K.S.A. 44-508(d) which provides for the determination of the date of accident in a repetitive trauma case:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection

> shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[5]

In this case the date of injury would be the date claimant gave written notice to respondent. Respondent received a copy of claimant's written claim for compensation on July 22, 2009.[6] The respondent's brief to the board agrees that July 22, 2009, would be the appropriate date of accident under the circumstances of this claim. The respondent received written notice of claimant's injuries on July 22, 2009, consequently, notice to respondent was timely.[7]

The next issue is whether claimant met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment. The claimant was diagnosed with avascular necrosis which ultimately required hip replacement surgery. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[9] The ALJ concluded claimant's work activities aggravated or intensified her condition and found the claim compensable.

Respondent argues that the preponderance of the medical evidence, including the opinion of the court ordered independent medical examiner, established that claimant's avascular necrosis was neither caused nor aggravated by her work for respondent. The Board agrees.

The Kansas Supreme Court has held that there are three general categories of risks in workers compensation cases: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) the so-called neutral risks which have no particular employment or personal character.[10] Only those risks falling in the first category are universally compensable; personal risks do not rise out of the employment and are not

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[5] K.S.A. 2008 Supp. 44-508(d).

[6] R.H. Trans., Cl. Ex. 3.

[7] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

[8] *Bryant v. Midwest Staff Solutions,* 292 Kan. 585, 257 P.3d 255 (2011); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[10] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

compensable.[11] Three cases that are illustrative of these three categories of risks in the context of "personal injury" as defined by K.S.A. 44-508(e) and their interplay with aggravations of preexisting conditions, the natural aging process, and normal activities of day-to-day living, are *Martin*[12], *Boeckmann*,[13] and *Anderson*.[14]

The claimant in *Martin* was a custodian at a public school who suffered from a long history of back problems. Upon arriving at the parking lot of the school, Martin attempted to get out of his vehicle but twisted his back. The court denied compensation, concluding that the risk involved in Martin's accident was not associated with his employment and there were no intervening or contributing causes for the accident. Rather, the risk was personal to Martin. The fact that Martin's back problems could be aggravated by almost any everyday activity bolstered the court's conclusion that his injury was the result of a personal risk.[15]

The claimant in *Boeckmann* was an inspector of truck and tractor tires who suffered from degenerative arthritis of his hips. He underwent an operation on his left hip, but within three years the pain in his right hip began to worsen. Three weeks before his injury, Boeckmann was lying on a conveyor belt. As he got up, he felt a pain in his back. Boeckmann was not able to work for three days. The day of his injury, Boeckmann stooped down to pick up a tire and injured his back. The court denied compensation, finding that Boeckmann's everyday bodily motions required at work gradually and imperceptibly eroded the physical fibers of his structure. The court further found that any movement would aggravate Boeckmann's condition, regardless of whether the activity took place on or off the job.[16] The Board has described the 1993 amendments to K.S.A. 44-508(e) as a codification of *Boeckmann*.[17]

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[11] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

[12] *Id.*

[13] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[14] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[15] *Martin*, 5 Kan. App. 2d at 300.

[16] *Boeckmann*, 210 Kan. at 739.

[17] See, *e.g.*, *Richey v. Kansas Golf Assn., Inc.*, Docket No. 1,000,992, 2002 WL 1838714 (Kan. WCAB July 24, 2002); *Anthony v. PSI Group, Inc.*, Docket Nos. 265,870 and 265,871, 2001 WL 1399482 (Kan. WCAB Oct. 26, 2001); *McConnell v. Farmland Industries, Inc.*, Docket No. 227,052, 1997 WL 802920 (Kan. WCAB Dec. 31, 1997); *Munoz v. Frito-Lay, Inc.*, Docket No. 183,437, 1994 WL 749270, (Kan. WCAB Apr. 18, 1994).

The claimant in *Anderson* installed convertible tops, headliners, and carpets. Anderson suffered from a long history of back problems. He got in and out of vehicles 20 to 30 times a day, and on one occasion he injured his lower back. The court distinguished *Anderson* from *Martin* and *Boeckmann*, finding that Anderson's injury followed not only from his personal degenerative conditions but from a hazard of his employment, *i.e.*, the requirement that he constantly enter and exit vehicles. The court found the fact that Anderson's back problems could be aggravated by everyday activities was not controlling.[18]

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. [Citation omitted.] But where an injury results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed.[19]

The court determined that Anderson's injury resulted from the combination of his preexisting personal degenerative conditions and a work-related hazard.[20]

Although many of claimant's work activities, such as standing, walking, bending, stooping, squatting, lifting, and carrying can be described as normal activities of day-to-day living, K.S.A. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. The intent of this statute is to avoid paying workers compensation benefits for conditions that result from risks that are solely personal to the worker.[21]

In this case Drs. Stein, Schurman and Pratt concluded claimant's avascular necrosis was not caused by her work. Moreover, Dr. Stein and the court ordered independent medical examiner, Dr. Pratt, concluded claimant's work activities simply caused an increase in claimant's symptoms but did not aggravate, accelerate or intensify the avascular necrosis. Dr. Pratt noted claimant's avascular necrosis would have continued to progress to the point where she needed surgery as long as she continued to ambulate irrespective of her work. The Board finds that claimant has failed to prove that if she had not been employed as she was with respondent, she would not be equally injured.[22] In other words, the greater weight of the credible evidence does not establish that claimant's

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[18] *Anderson*, 31 Kan. App. 2d at 11.

[19] *Id.* (quoting *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001 [1992]).

[20] *Id.* at 12.

[21] *Boeckmann*, 210 Kan. 733; *Hensley,* 226 Kan. 256*; Anderson*, 31 Kan. App. 2d 5; *Martin*, 5 Kan. App. 2d 298.

[22] See *Anderson*, 31 Kan. App. 2d at 11.

work activities increased her risk of injury or otherwise contributed to her present condition to a greater degree than if she had not been so employed. The greater weight of the expert medical opinion testimony fails to establish that claimant's work activities aggravated, accelerated or intensified her avascular necrosis beyond that caused by the natural aging process and her normal activities of day-to-day living. The Board finds this case to be closer to *Boeckmann* than to *Anderson*. As such, claimant has failed to prove that her injuries arose out of her employment with respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[23] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated August 9, 2011, is reversed and compensation denied.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[23] K.S.A. 2010 Supp. 44-555c(k).